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No. 02-524

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In The
Supreme Court of the United States

JANETTE PRICE,

Petitioner,

v.

DUYONN ANDRE VINCENT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S BRIEF

MICHAEL A. COX
Attorney General
THOMAS L. CASEY
Solicitor General
JANET A. VAN CLEVE
Assistant Attorney General

ARTHUR A. BUSCH
Genesee County Prosecuting Attorney
DONALD A. KUEBLER
Chief, Research, Training & Appeals
JOHN C. SCHLINKER
Deputy Chief Assistant Prosecutor,
Counsel of Record
DALE A. DEGARMO
Assistant Prosecuting Attorney
MICHAEL A. TESNER
Assistant Prosecuting Attorney
100 Courthouse
Flint, Michigan 48502
(810) 257-3854
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I.

Whether the Michigan Supreme Court's conclusion that the trial court did not direct a verdict of acquittal is a factual finding entitled to deference on *habeas corpus* review.

II.

Whether defendant Vincent was twice placed in jeopardy by the action of the trial court in first granting a motion for directed verdict on the issue of first degree murder, and shortly thereafter withdrawing its grant, where both the initial decision and its recall occurred out of the presence of the jury.

PARTIES TO THE PROCEEDING

This case arises out of the federal habeas review of the constitutionality of a state prisoner's conviction on double jeopardy grounds. The Petitioner, Janette Price,[1] is the warden of the state prison where Respondent claims he is unlawfully incarcerated for first-degree murder. The Respondent, Duyonn Andre Vincent, is the incarcerated prisoner who asserts that the trial judge's initial reaction relative to his directed verdict motion constituted an acquittal of the first-degree murder charge.

[1] Janette Price is now designated as Petitioner in lieu of Kurt Jones, inasmuch as she is the Michigan Warden where Respondent Vincent is currently incarcerated.

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OPINIONS BELOW

Respondent was convicted of first-degree murder and felony firearm. He appealed his first-degree murder conviction asserting violation of his double jeopardy rights. On February 16, 1996, the Michigan Court of Appeals vacated Respondent's conviction for first-degree murder on double jeopardy grounds. This is reported at *People v. Vincent*, 215 Mich. App. 458, 546 N.W.2d 662 (1996). [Pet. App. pp.14a-25a].

The People of Michigan sought and obtained leave to appeal to the Michigan Supreme Court. On July 15, 1997, the Michigan Supreme Court reversed the Michigan Court of Appeals and ordered that Respondent's first-degree murder conviction be reinstated. *People v. Vincent*, 455 Mich. 110, 565 N.W.2d 629 (1997). [Pet. App. 26a-51a]. Respondent's request for rehearing was denied. *People v. Vincent,* 456 Mich. 1201 (1997). Respondent filed a petition for writ of certiorari in the United States Supreme Court that was denied on November 10, 1997. *Vincent v. Michigan*, 522 U.S. 972 (1997).

Respondent then filed a petition for habeas corpus relief under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Michigan. On November 2, 2000, the District Court granted habeas corpus relief and vacated his conviction for first-degree murder on double jeopardy grounds. *Vincent v. Jones*, 98-40007 (E.D. Mich. Nov. 2, 2000). [Pet. App. pp. 78a-83a].

Petitioner Jones appealed to the United States Court of Appeals for the Sixth Circuit. On June 6, 2002, the Court of Appeals entered an opinion affirming the District Court below and on July 2, 2002 the Court issued its

mandate. *Vincent v. Jones*, 292 F.3d 506 (6th Cir. 2002). [Pet. App. pp. 1a-14a].

JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the Sixth Circuit, entered July 2, 2002. *Vincent v. Jones*, 292 F.3d 506 (6th Cir. 2002). [Pet. App. pp. 1a-14a]. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

28 U.S.C. § 2254 provides that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

1. Facts relating to the murder

Respondent Vincent, along with two codefendants, was charged with first-degree murder for the gang-related killing of Markeis Jones in the parking lot of a high school in Flint, Michigan. The Michigan Supreme Court summarized the trial evidence:

> The defendant and his two codefendants were charged with open murder and possession of a firearm during the commission of a felony, arising from the shooting death of Markeis Jones. Jones was shot during a confrontation between two groups of youths at Hamady High School in Flint. The defendant and his friends did not attend Hamady, but were waiting for friends who were attending a dance at the high school. In the school driveway the two groups of youths were arguing. There was some pushing and shoving and some verbal threats. Ultimately several shots were fired out of the back of a

Mustang hatchback. Testimony indicated that defendant and codefendant Dameon Perkins fired shots from the back of the car. Codefendant Marcus Hopkins drove the car away as the shots were fired. There is some evidence in the record indicating that the shots missed their intended mark and inadvertently hit Markeis Jones, a friend of the defendants. There is also evidence in the record that the confrontation was gang related, involving rival groups known as "Folks Up" and "Folks Down."

All three young men were charged with open murder and felony firearm and were tried before two separate juries during one trial. Defendant Vincent and codefendant Hopkins were tried by one jury, while codefendant Perkins was tried by a second. [*People v. Vincent*, 455 Mich. 110, 112-113 (1997); Pet. App. p. 27a].

2. Facts relating to the double jeopardy claim

A. March 31, 1992

On March 31, 1992, following the close of the state's case-in-chief, counsel for all three defendants moved for directed verdicts of acquittal on the charge of first-degree murder. Counsel argued that there was insufficient evidence of premeditation and deliberation and that the shooting was unplanned and spontaneous. [Joint App. pp. 4-8]. The prosecutor opposed the motion. [Joint App. pp. 8-12].

The trial court judge initially indicated that his "impression" was that second-degree murder was the appropriate murder charge but he later agreed to give

further consideration to the charge the next day to allow the prosecutor to research the issue:

> THE COURT: Nothing else? Well my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different then [sic] anyone else as I hear the comment made by Mr. Doll [counsel for Perkins] about the short time in which his client was in the vehicle. But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgment was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay. [Joint App. pp. 12-13].
>
> * * *
>
> MR. STAMOS: When the juries come back tomorrow can I make a brief restatement in terms of the First Degree Murder . . .
>
> THE COURT: Yes, I'll be glad to hear it. Sure. I'm always glad to hear people.
>
> MS. CUMMINGS: So that means we have to be here at eight thirty then?
>
> THE COURT: I assume so, yes. If he wants to make a statement it should apply to everybody.

MR. STAMOS: Yes, I'd just like to look up, find some law.

THE COURT: That's fine. I'm glad to hear you. Whatever you want to do is fine with me. [Joint App. p. 18].

The above discussion took place out of the presence of the jury.

B. April 1, 1992

The following morning, April 1, 1992, the prosecutor argued that there was more than sufficient evidence to survive a motion for directed verdict on the first-degree murder charges. [Joint App. pp. 21-32]. Defense counsel took the position that the court had already directed a verdict resulting in a final judgment of acquittal on the first-degree murder charges and that double jeopardy prohibited the case from going forward on the charge of first-degree murder. [Joint App. pp. 32-40]. The trial court stressed that the jury had not been informed of any ruling and the trial court judge was of the opinion that he had made no dispositive ruling and was thus free to consider the prosecutor's argument on the first-degree murder charge without jeopardy terminating. In response to defense counsel's argument to the contrary, the trial court judge said:

THE COURT: Do you really believe that? You think that when a decision is made that before it's recited to the parties who are directly involved in it and particularly the jury we're asking now for the jury not to consider certain factors that might be brought to them, that a court cannot consider things in great length and

I, I try to be an open person, I try to give everybody an opportunity to talk and to say any thing they want. And I'm not a stick in the mud. I just don't stick there and say "well, that's where I am." I try to be open about things and flexible. [Joint App. p. 34].

* * *

THE COURT: You think double jeopardy has anything to do with this?

MS. CUMMINGS: Yes. I believe once you've directed. A verdict –

THE COURT: Why is that?

MS. CUMMINGS: A verdict that that's . . .

THE COURT: I haven't directed a verdict to any body.

MS. CUMMINGS: You granted our motion.

THE COURT: Oh, I granted a motion but I have not directed a verdict. [Joint App. p. 36].

* * *

Well, I'm going to consider the argument that counsel has made. And Counsel should certainly be aware of the fact that there has been no harm that has come about by the Court's ruling earlier. The jury was not alerted or informed in any way whatsoever as to the, the conclusion this Court drew after arguments of counsel. I'm going to reserve a ruling on it. We'll come back to it a little later on after I hear a good more and think a little bit more about it.

Now I'm basing, of course, the decision upon what we have up until such a time as the

> motion's been made. But I'll reserve the ruling. [Joint App. pp. 42-43].

The trial then continued. Respondent testified, as did another witness. [Pet. App. pp. 5a, 16a].

C. April 2, 1992

The next morning, April 2, 1992, the trial judge stated that he had considered all of the arguments on the first-degree murder charge and would submit the first-degree charge to the jury:

> THE COURT: I've reconsidered the ruling of the Court earlier made and I've decided to let the jury make its own determination on the degrees. That's where we'll stand now so we'll let them have all those issues submitted to them, First, second, Manslaughter and you can go on from there. [Joint App. pp. 45-46].

The jury convicted Respondent Vincent of first-degree murder, [M.C.L. 750.316] and felony firearm, [M.C.L. 750.227b]. [Pet. App. pp. 2a, 14a]. Codefendant Dameon Perkins was convicted by the same jury of second-degree murder and felony firearm. Codefendant Marcus Hopkins was convicted by a separate jury of involuntary manslaughter and felony firearm. [Pet. App. pp. 3a, 14a-15a].

3. State court trial proceedings

The Michigan Court of Appeals vacated Respondent Vincent's first-degree murder conviction and reduced it to second-degree murder on double jeopardy grounds. *People v. Vincent*, 215 Mich. App. 458, 546 N.W.2d 662 (1996). [Pet. App. 14a-25a]. Leave to appeal to the Michigan

Supreme Court was granted and that Court reversed and ordered reinstatement of Respondent's first-degree murder conviction. *People v. Vincent*, 455 Mich. 110, 565 N.W.2d 629 (1997). [Pet. App. 26a-51a].

Respondent's petition for a *writ of certiorari* was denied by the United States Supreme Court on November 10, 1997. *Vincent v. Michigan*, 522 U.S. 972 (1997).

4. Federal court trial proceedings

On January 8, 1998, Vincent sought a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Michigan. In his petition, Vincent contended the Michigan Supreme Court's conclusion that an oral grant of a directed verdict not reduced to writing was insufficient to terminate jeopardy was contrary to, or an unreasonable application of, United States Supreme Court precedent. The case was referred to the magistrate judge who recommended granting the writ. [Pet. App. p. 76a]. The District Court, Gadola, J., considering the matter *de novo*, found that the statements of the trial court were sufficient to rise to the level of an acquittal of the first-degree murder charge under United States Supreme Court precedent and that continuation of the trial constituted a violation of the Double Jeopardy Clause of the Fifth Amendment. [Report and Recommendation of Magistrate; Pet. App. pp. 52a-77a]. See, Opinion and Order granting habeas corpus. [Pet. App. pp. 78a-83a].

Petitioner Jones appealed to the United States Court of Appeals for the Sixth Circuit. On June 6, 2002, the Sixth Circuit Court of Appeals affirmed the district court and held as a matter of law that the statements of the trial judge constituted a directed verdict of acquittal such that

jeopardy attached, and that the trial court could not reverse that decision later in the trial and permit the case to go to the jury for decision. The court said it was irrelevant whether the trial judge informed the jury of his decision. The Sixth Circuit found that the state trial judge made a determination that there was insufficient evidence of first-degree murder and that by later submitting the case to the jury on the charge of first-degree murder, petitioner's rights under the Double Jeopardy Clause had been violated. [Pet. App. pp. 1a-12a]. The Court of Appeals issued its Mandate on July 2, 2002. [Pet. App. p. 13a]. Petitioner filed for *certiorari* and requests reversal of the Sixth Circuit's grant of habeas relief and reinstatement of Respondent's conviction and sentence for first-degree murder.

On January 10, 2003, the United States Supreme Court granted *certiorari* in this case to answer the questions: 1. Whether the Michigan Supreme Court's conclusion that the trial court did not direct a verdict of acquittal is a factual finding entitled to deference on habeas corpus review, and, 2. Whether defendant Vincent was twice placed in jeopardy by the action of the trial court in first granting a motion for directed verdict on the issue of first-degree murder, and shortly thereafter withdrawing its grant, where both the initial decision and its recall occurred out of the presence of the jury.

SUMMARY OF THE ARGUMENT

Argument I:

"The Antiterrorism and Effective Death Penalty Act of 1996" (AEDPA), 28 U.S.C. § 2254(a), requires a federal

court reviewing a state prisoner's habeas corpus claims to focus on the state court's decision to deny relief and to give high deference and demands that the state be given the benefit of the doubt. *Woodford v. Visciotti*, ___ U.S. ___, 123 S. Ct. 357, 360, 154 L.Ed.2d 279 (2002). The writ may issue only if the state court's consideration of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or was based on an "unreasonable determination of the facts in light of the evidence presented," 28 U.S.C. § 2254(d)(2).

In this case, the Michigan Supreme Court decided Respondent's claim on a purely factual basis, finding as a matter of fact that the trial court did not grant the motion for directed verdict and, for that reason, did not violate his rights under the Double Jeopardy Clause of the Fifth Amendment. The Sixth Circuit Court of Appeals erroneously reviewed the trial court's statements *de novo* and resolved a factual dispute contrary to the resolution by the Michigan Supreme Court without application of the standard of review mandated by the AEDPA and by this Court's decisions.

Argument II:

Applying the standard of review mandated by § 2254(d)(1), the Sixth Circuit was entitled to affirm the district court's grant of the writ only if the state court's decision was contrary to, or an unreasonable application of, this Court's clearly established law. This Court's cases simply do not clearly establish that double jeopardy prohibits a state trial judge from correcting the erroneous

grant of a motion for directed verdict where the jury was not informed or discharged and no further trial proceedings were conducted between the grant and the court's reconsideration and withdrawal.

This Court explained in *Williams v. Taylor*, 529 U.S. 362 (2000), that the "contrary to" and "unreasonable application" clauses have independent meaning. A state court decision will be "contrary to" this Court's clearly established precedent if the state court either applies a rule that contradicts the governing law set forth in the court's cases, or confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from the Court's precedent. *Id.* at 405-06. When a decision is not contrary to United States Supreme Court law, the habeas court must consider it under the unreasonable application clause. *Early v. Packer*, ___ U.S. ___, 154 L.Ed.2d 263, 271, 123 S. Ct. 362, 366 (2002).

No case from this Court has considered the issue presently before the Court: whether a directed verdict becomes an acquittal terminating jeopardy either in the moment when a motion for directed verdict is granted, when such a ruling is reduced to writing and entered upon the record, or not until the jury is so directed. Thus, the Michigan Supreme Court's decision did not unreasonably apply any United States Supreme Court precedent.

In a criminal case, a trial judge may, without violating the Double Jeopardy Clause of the Fifth Amendment, correct an erroneous grant of a defendant's motion for directed verdict where the jury was not informed of the grant or discharged from service and no further trial

proceeding were conducted between the grant and the court's corrective action.

In this case, the Respondent was only tried once and did not incur any prejudice whatsoever due to the trial court's conduct. Indeed, there were no proceedings between the time the trial court granted the motion at the end of one day and then withdrew its grant the next morning.

Clearly, a rule that a defendant is acquitted as soon as granting words are spoken is both unjust and unworkable. Furthermore, the rule would be unnecessary to protect the interest that the Double Jeopardy Clause was designed to protect. Should this Court reach the issue, the Court should hold that jeopardy does not attach until the defendant incurs some material prejudice, i.e., where the proceedings continue to the detriment of the defendant or the ruling is conveyed to the jury.

The state court's decision was neither contrary to nor an unreasonable application of clearly established United States Supreme Court law. Moreover, the actions of the trial court did not violate the Double Jeopardy Clause of the United States Constitution.

ARGUMENT

I. The Sixth Circuit Court of Appeals failed to afford the deference mandated by "The Antiterrorism and Effective Death Penalty Act of 1996" to the Michigan Supreme Court's factual finding, that the trial court had not granted Respondent Vincent's motion for directed verdict of acquittal.

This case involves the exercise of the federal court's habeas corpus jurisdiction to review the legality of a state prisoner's custody to determine whether he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). Petitioner contends that the United States Sixth Circuit Court of Appeals failed to apply the deferential standard of review mandated by the amendments to the federal habeas statute contained in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2254(a). The Sixth Circuit's *de novo* review and affirmance of the district court's grant of habeas corpus relief failed to afford the state court's decision the deference mandated by the statute and by this Court.

As amended, Section 2254 of Title 28, United States Code provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (3) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (4) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The AEDPA effected a dramatic change in habeas corpus law by requiring a federal court reviewing a state prisoner's claims to focus its attention squarely on the state court's decision to deny relief. The statute imposes a highly deferential standard for evaluating state court rulings, and demands that the state be given the benefit of the doubt. *Woodford v. Visciotti*, ___ U.S. ___, 123 S. Ct. 357, 360, 154 L.Ed.2d 279 (2002). The double jeopardy claim in Respondent Vincent's habeas petition is the same claim rejected on direct appeal by the Michigan Supreme Court. Although the Sixth Circuit panel correctly recognized the applicability of § 2254(d), it failed to apply the standard of review mandated by the amended statute.

The Sixth Circuit recited the language of § 2254(d) and characterized the interpretation outlined by this Court in *Williams v. Taylor*, 529 U.S. 362 (2000) as follows: "[A] writ may issue if the state court applied a legal rule that contradicts United States Supreme Court precedent, or if the state court applied the correct legal rule but its application of the rule to the facts of the case was objectively unreasonable." *Vincent v. Jones*, 292 F.3d 506, 510 (6th Cir. 2002) [Pet. App. p. 8a]. Despite the Sixth Circuit's apparent recognition of the governing standard, however, the Sixth Circuit considered Respondent's claim *de novo*, reviewing the statements made by the trial court judge to determine whether that court had granted the motion for directed verdict, and whether the "statements and actions constituted a resolution of some or all of the factual elements of the offense charged such that jeopardy

attached." *Id.* at 512 [Pet. App. p. 12a] citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). The Sixth Circuit incorrectly opined that, "We are not bound by the holdings of the Michigan Supreme Court that the trial judge's statements did not constitute a directed verdict under Michigan law. Instead, we must examine the state trial judge's comments to determine whether he made a ruling which resolved the factual elements of the first-degree murder charge." *Vincent,* 292 F.3d at 511. [Pet. App. 10a]. The panel appeared to believe that, in spite of the restrictions of the habeas standard, this Court's decisions in *Martin Linen* and *Smalis v. Pennsylvania*, 476 U.S. 140 (1986) required it to conduct *de novo* review of the statements of the trial judge to determine whether the court had granted an order constituting an acquittal.

When exercising habeas corpus jurisdiction, it is necessary for the federal courts to determine whether the state court resolved the question upon a purely factual basis, or as a matter of law, or on the basis of mixed law and fact. If the state court resolved the question solely upon a resolution of factual issues, the habeas court's task under § 2254(d)(2) is to determine whether the state court's decision was "based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2).

In this case, the Michigan Supreme Court decided Vincent's claim on a purely factual basis, finding as a matter of fact that the trial court did not grant the motion for directed verdict and, for that reason, did not violate Respondent's rights under the Double Jeopardy Clause:

> We reverse the decision of the Court of Appeals and hold, on the basis of the following evaluation, that the judge's inchoate impressions

> did not mature into a final judgment of acquittal of the charge. Consequently, Vincent's right not to be placed twice in jeopardy was not violated.
>
> * * *
>
> A judge's thinking process should not have final or binding effect until formally incorporated into the findings, conclusions, or judgment. This concept finds support in our own court rules. MCR 2.602(A) requires that judgments and orders be "in writing, signed by the court and dated with the date they are signed." **None of the indicia of formality associated with final judgments are present in the trial judge's comments at issue here. There was no statement in the record that an order or judgment was being entered at all.** "Okay" does not equate with "It is so ordered." Further, we note that the trial court **did not substantially comply with the requirement** of MCR 6.419(D) **that provides "[t]he court must state orally on the record or in a written ruling made a part of the record its reasons for granting or denying a motion for a directed verdict of acquittal. . . . "** As we stated in part II(B), the loose impressions of the judge cannot be construed as an adequate evaluation of the evidence. Instead, it reflects a tentative conclusion, not a formal resolution on the factual elements of the offense charged.
>
> **There was nothing to indicate that the judge's impression in this case was anything more than an initial assessment of a possible future ruling.** *People v. Jackson*, 232 AD2d 193; 647 NYS2d 764 (1996). Similarly there was nothing to indicate that this was anything more than a continuing discussion between

the parties. *State v. Newfield*, 161 Ariz. 470, 472; 778 P.2d 1366 (Ariz. App. 1989). Further, we are inclined to agree with a decision of the United States Court of Appeals for the Second Circuit holding that a judge's decision to submit the charge to the jury implicitly denies the motion. *United States v. Bruno*, 873 F.2d 555, 562 (2nd Cir. 1989).

The fact that the judge decided to entertain additional arguments the next day is further indication that he had not made a final decision. We are aware that how the judge characterizes his statement is not controlling, or is the form of the so-called ruling controlling, but in this case we find that the judge was correct. He had not directed a verdict. Statements couched in the terms "my impression," "I think," "in the event that it's not our premeditation planning episode," and "[i]t may very well be," do not resound in finality. To the contrary they are clearly equivocal. **We would be hard pressed to call that kind of indecisive pondering a final judgment of acquittal.**

We hold that in order to qualify as a directed verdict of acquittal there must be either a clear statement in the record or a signed order of judgment articulating the reasons for granting or denying the motion so that it is evident that there has been a final resolution of some or all the factual elements of the offense charged. In this case, the judge's comments concerning the sufficiency of evidence regarding the issue of premeditation and deliberation lacked the requisite degree of clarity and specificity. In addition, there was no formal judgment or order entered on the record to indicate what the exact nature of the ruling was and why. Accordingly, we hold

> that the responses of the trial judge to the motions for directed verdicts never became final with respect to the charge of first-degree murder. Consequently, the continuation of the trial and subsequent conviction did not prejudice or violate the defendant's constitutional rights. [*People v. Vincent,* 455 Mich. 110, at 118, 125-127 (emphasis added)] [Pet. App. pp. 33a, 40a-42a].

Thus, the Michigan Supreme Court resolved the double jeopardy claim by rejecting the necessary factual predicate to Respondent's claim: that a motion for directed verdict was granted at all. The double jeopardy claim in this case involves two distinct questions. The first question is whether an order for directed verdict was granted by the trial court. That question is factual. The second question is, if so, whether the order was an acquittal for purposes of the Fifth Amendment's Double Jeopardy Clause. The second question is a matter of law.

The lower federal courts advanced two related bases for rejecting the state's contention that the Michigan Supreme Court's decision was based on a determination of a factual issue. First, the federal courts relied on the holding of *Smalis* that a state appellate court's characterization of a trial court's order is not binding on a federal court considering a double jeopardy claim. Second, the courts concluded that because the statements made by the trial judge were a matter of record, and therefore undisputed, the state court's conclusion that those statements did not grant a directed verdict was not the resolution of a factual dispute.

The federal court failed to perceive a dispositive distinction between the question presented in this case

and the question presented in *Smalis*. In *Smalis*, the trial court found that the prosecutor had not presented sufficient evidence to find the defendants guilty beyond a reasonable doubt, and granted a "demurrer" pursuant to Pennsylvania law. In concluding that the court's order was subject to appeal by the prosecution, the Pennsylvania Supreme Court held that a demurrer was not an acquittal for purposes of the Double Jeopardy Clause. On direct appeal, this Court held that it was not bound by the state court's conclusion that a demurrer was not an acquittal.

The *Smalis* Court considered the preclusive effect of a certain kind of state court order. The Court did not address the antecedent factual question – whether an order was granted at all. If the Michigan Supreme Court in this case had held that *a directed verdict is not an acquittal, Smalis* would be clearly on point. That is not what the Michigan court held, however. The Michigan Supreme Court's decision was that *the trial court had not granted the defendant's motion for directed verdict*. If there had been a dispute in *Smalis* similar to the question here, this Court would have found it necessary to consider first whether an order had been made, and only then would the Court have reached the issue of the legal import of the order relative to double jeopardy. Because there was no dispute as to the first question, that issue was not separately discussed but was simply assumed. It was manifestly clear, not only from the proceedings below, but also from the statements of the Court that a dispositive order had been granted:

> "We hold, therefore that *the trial judge's granting of petitioner's demurrer* was an acquittal under the Double Jeopardy Clause, and that the Commonwealth's appeal was barred because reversal

> would have led to further trial proceedings." [*Smalis, supra*, 476 U.S. at 145]

In contrast, the instant case presents exactly the opposite situation. The dispute here centers on the threshold question: Whether an order granting a motion for directed verdict was made. There was no contention in this case that a directed verdict is not an acquittal, the Michigan Supreme Court unequivocally stated that it is. *Vincent, supra*, 455 Mich. at 119-120. [Pet. App. pp. 34a-35a]. *Smalis* clearly does not support the conclusion that the federal court was required to conduct *de novo* review of the Michigan Supreme Court's factual decision that the order had not been granted.

It was also the view of the district court and the Sixth Circuit panel that, because the trial judge's remarks themselves were not in dispute, the conclusion that the Michigan Supreme Court drew from its review of those remarks, i.e., whether or not an order was granted, could not have been a factual finding. This rationale was simply stated in conclusory fashion by both courts without discussion. *Vincent,* 292 F.3d at 511. [Pet. App. p. 12a]. This Court, however, has held that a state appellate court's determination of what a trial judge found upon consideration of ambiguous comments by the lower court is a conclusion of historical fact.

The question whether an appellate court's interpretation of a trial judge's ambiguous remarks is a finding of fact or an issue of law, was resolved by this Court in *Parker v. Dugger*, 498 U.S. 308, 320 (1991):

> In *Wainwright v. Goode*, 464 US 78, 83-85 (1983), the Court held that a federal court on habeas review must give deference to a state

> appellate court's resolution of an ambiguity in a state trial court statement. We did not decide in *Goode* whether the issue resolved by the state appellate court was properly characterized as one of law or of fact. In this case, we conclude that *a determination of what the trial judge found is an issue of historical fact*. It depends on an examination of the transcript of the trial and sentencing hearing and the sentencing order. [emphasis added]

In this case, the Michigan Supreme Court clearly examined the trial transcripts and resolved ambiguities in the trial court's statements. The state court's factual determination that there was no order granting the motion for directed verdict was therefore entitled to the deference mandated by the habeas statute. This was true under *Parker,* decided with reference to pre-AEDPA law, and under the 1996 habeas amendments, which substantially increased the deference to be accorded to state court decisions. *Williams v. Taylor*, 529 U.S. at 412. Under the AEDPA, the federal court was without authority to grant relief in this case on the basis of its mere disagreement with the Michigan Supreme Court's resolution of the ambiguous statements of the trial court. Mere disagreement by the federal court with the state court's decision will not support habeas relief:

> In § 2254(d)(1), Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect." Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application

> must also be unreasonable. [*Williams v. Taylor*, 529 U.S. at 411]

There is no reason to suppose that Congress intended a different meaning of the word "unreasonable" as it was used with regard to factual conclusions in § 2254(d)(2).

The Sixth Circuit Court of Appeals characterized this case as requiring determination of a legal question and not a factual question. But the panel then proceeded to resolve both questions without acknowledging that it was doing so. The court initially considered, *de novo*, the factual question: whether the trial judge had granted the motion for directed verdict. The court stated, "we must examine the state trial judge's comments to determine *whether he made a ruling* which resolved the factual elements of the first-degree murder charge." *Vincent,* 292 F.3d at 511. [Pet. App. p. 10a]. "A review of the trial transcript reveals that *the trial judge initially granted the motion* for directed verdict through his statements at the end of the day March 31, 1992." *Id.* "*Our conclusion that the trial judge granted the motion* is warranted by the precise language he used." *Id.*

Only after substituting its own factual determination regarding the grant of a motion for directed verdict did the panel proceed to resolve a second, legal issue.

> We now address whether the above statements and actions constituted a resolution of some or all of the factual elements of the offense charged such that jeopardy attached. *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 571 (1977). We find that when the trial judge granted the motion for directed verdict on March 31, 1992, his actions constituted a grant of an acquittal on the first-degree murder charge such

that jeopardy attached. [*Id.* at 512; Pet. App. p. 12a]

The Sixth Circuit Court of Appeals erroneously reviewed the trial court's statements *de novo* and resolved a factual dispute contrary to the resolution by the Michigan Supreme Court without application of the standard of review mandated by the habeas corpus statute and by this Court's decisions. That standard of review required acceptance of the state court's finding that there was no order of directed verdict unless the habeas courts determined that this decision was an unreasonable determination of the facts in light of the evidence presented in state court.

The state court factual determination that there was no grant of the motion for directed verdict was reasonable in light of the evidence presented in state court. The trial court's statements reveal a number of ambiguities. Responding to the motion for directed verdict, the court began its colloquy with, "Well, my impression at this time is" . . . . The court then made two statements: "that there's not been shown premeditation or planning in the alleged slaying," and "that what we have at the very best is second-degree murder." Because the court's second sentence began with the word, "that", it could easily be concluded that the words, "my impression at this time" were meant to apply to both statements. Such equivocation is clearly not indicative of a final order. The court's final statement, "and I think that second-degree murder is an appropriate charge as to the defendants. Okay." is also equivocal because of the words, "I think". [Pet. App. pp. 3a, 28a]. The Michigan Supreme Court referred to the ambiguous nature of the trial judge's language:

> Statements couched in the terms "my impression," "I think," "in the event that it's not our premeditation planning episode," and "[i]t may very well be," do not resound in finality. To the contrary they are clearly equivocal. We would be hard pressed to call this kind of indecisive pondering a final judgment of acquittal. [455 Mich. at 126 (footnote omitted)] [Pet. App. p. 41a].

Shortly before the proceedings were adjourned for the day, the prosecutor asked, "When the juries come back tomorrow can I make a brief restatement in terms of the first-degree murder . . . ". The court replied, "Yes, I'll be glad to hear it. Sure. I'm always glad to hear people." [Joint App. p. 18]. Clearly, entertaining further argument on the question is inconsistent with a final order having been made.[2]

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[2] The statements of the trial judge in this case were considered four times by Michigan appellate courts. Petitioner's two co-defendants were denied relief in separate opinions in the Michigan Court of Appeals. In co-defendant Hopkins' appeal, the court stated as follows:

> While the court expressed an opinion that ultimately would have ripened into a final ruling had nothing intervened and the court taken the issue from the jury, the court, before acting on its expressed opinion, agreed to hear further argument from the prosecutor regarding the issue. When the court recessed for the day, everyone was aware that the prosecutor was going to present further argument on the issue of first-degree murder the next morning, before defendants would proceed with their cases. The matter was addressed the next morning, and the court reconsidered its opinion earlier expressed, concluding that it would reserve ruling. Thus, the record indicates that the court expressed an opinion, and then before finalizing that opinion, agreed to entertain further argument. The court did not make a final ruling until it denied defendant's motion for directed

(Continued on following page)

The Michigan Supreme Court was clearly resolving ambiguities in the trial court's statements to determine whether the motion for directed verdict was granted on March 31. In a motion for rehearing in the Michigan Supreme Court, Respondent's counsel presented to the court, for the first time, a docket entry for March 31, 1992 from the Genesee County Circuit Court stating that motions for directed verdicts had been granted. Because it was not timely presented, it was not discussed in the Michigan Supreme Court's opinion. Although the Court had stated in a footnote that a docket entry, among other things, "might be considered in evaluating finality," the Court declined to reopen the case on Respondent's motion

verdict and submitted the case to the jury. We conclude the court was not barred from further consideration of the matter. [Unpublished opinion per curiam, issued October 20, 1995 (Docket No. 158133), slip op at 2.] [*People v. Vincent*, 455 Mich at 116]

In co-defendant Perkins' case, the Court of Appeals held that "[s]ince the trial court had never indicated to the jury that it was directing a verdict of acquittal on first-degree murder, there was no prejudice to defendant and, more importantly, defendant's double jeopardy rights were not violated. *Id.* at 117.

The Court of Appeals panel hearing Vincent's case reversed his conviction, finding that, although the trial judge's first statement, "Well, my impression at this time," was ambiguous, the later statement, "What we have at the very best is second-degree murder," was not. 215 Mich. App. 458, 468 (1996). The Michigan Supreme Court reversed, finding that the court's remarks were "inchoate impressions" that did not "mature into a final judgment." 455 Mich. at 118.

Thus, sixteen Michigan appellate judges have considered the same statements and reached different conclusions as to whether a motion was granted. Such an array of legal analysis resulting in differing conclusions would seem sufficient without more to establish that the court's remarks were ambiguous, and that a conclusion going in either direction would suffice as a reasonable one under § 2254(d)(2).

for reconsideration.[3] Docket entries in Michigan courts do not conform to the requirements for an order. *People v. Kelley*, 181 Mich. App. 95, 97-98, 449 N.W.2d 109 (1989). Moreover, the fact that the docket entries indicate neither the taking of the motion under advisement on April 1 nor the final denial on April 2 clearly demonstrates the unreliability of the docket entries as conclusive evidence of what occurred in court.

The Michigan Supreme Court's decision that Petitioner's rights under the Double Jeopardy Clause were not violated was based on a reasonable determination of the facts in light of the evidence presented. Because the Sixth Circuit Court of Appeals failed to recognize that the state court decision was based on a factual determination and failed to apply the correct standard of review, the court erred in its affirmance of the district court's grant of relief. The decision of the Court of Appeals must be reversed.

[3] In his brief in opposition to the petition for certiorari in this Court, Respondent's counsel stated, "In this case, of course, the trial judge did reduce his grant of directed verdict to writing by recording it in the formal docket entries for March 31, 1992." (Brief in Opposition to Petition, p. 16) Counsel made the same claim in his brief in the Court of Appeals. At oral argument in the Sixth Circuit, upon questioning by the court, counsel admitted that he had no evidence whatsoever that the docket entry was made by the trial judge.

II. Where a state trial court reconsidered and corrected its own erroneous grant of a motion for directed verdict to a criminal defendant in a jury trial and where: (1) the jury has neither been informed nor discharged; and (2) no trial proceedings were conducted between the grant of the motion and the withdrawal of the grant; A. The trial court's conduct is not contrary to, or an unreasonable application of, clearly established United States Supreme Court law, and; B. There is no constitutional double jeopardy violation.

A. The trial court's conduct was not contrary to, or an unreasonable application of, clearly established United States Supreme Court law.

Even if the issue decided by the Michigan Supreme Court is viewed as whether the trial judge's statements constituted an acquittal rather than whether the trial judge issued an order, the Sixth Circuit's decision failed to apply the standard mandated by the habeas statute and by this Court, and erroneously affirmed the grant of relief in this case. For purposes of this issue, Petitioner will assume, *arguendo*, that the trial court granted the motion for directed verdict and then, subsequently, withdrew the grant the next morning prior to the continuation of any proceedings in the case.

If the motion was granted, the grant occurred at the end of the day on March 31, 1992 and was clearly withdrawn the following morning, when the judge stated that

he would reserve his ruling on the motion.[4] The trial court considered defendant's objection and concluded that double jeopardy did not prevent the continuation of the trial on the first-degree murder charge. The trial court stated, "Oh I granted a motion but I have not directed a verdict." [Joint App. p. 36]. The court also referred several times to its previous "ruling", as the Court of Appeals noted. [Pet. App. p. 11a]. It is clear from the record that it was the trial judge's position that the Double Jeopardy Clause did not prevent him from reconsidering the grant of a motion for directed verdict since he had not informed the jury of his ruling. The trial court clearly believed that the grant of a motion for directed verdict does not constitute an acquittal for double jeopardy purposes until the jury is so informed. Applying the standard of review mandated by § 2254(d)(1), the Sixth Circuit was entitled to affirm the district court's grant of the writ only if the state court's decision was contrary to, or an unreasonable application of, this Court's clearly established law. This Court's cases simply do not clearly establish that double jeopardy prohibits a state trial judge from correcting the erroneous grant of a motion for directed verdict where the jury was not informed or discharged and no further trial proceedings were conducted between the grant and the court's reconsideration and withdrawal.

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[4] Respondent has argued throughout these proceedings that the court's alleged grant of the motion was not "reversed" until shortly before the jury was instructed. To the contrary, if there was a grant of the motion, it was withdrawn the following morning, before any further trial proceedings were conducted, when the judge reconsidered, entertained argument on the double jeopardy issue, and stated that he would reserve his ruling. [Joint App. pp. 42-43].

Clearly established Supreme Court precedent

This Court has refined the scope of the prohibition against government appeals under the Double Jeopardy Clause. It does not preclude an appeal where a post-verdict ruling appealed by the prosecution would not necessitate a second trial of the defendant and a successful governmental appeal would simply reinstate the guilty verdict. *United States v. Wilson*, 420 U.S. 332, 353 (1975). Also the mid-trial dismissal on procedural grounds prior to submission to the jury does not preclude a government appeal. *United States v. Scott,* 437 U.S. 82, 86-87 (1978). The purpose of the Double Jeopardy Clause was to prevent successive trials. *Wilson,* 420 U.S. at 353.

In *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), the Court affirmed the denial of a government appeal. The case involved a judgment of acquittal issued by the trial court after a deadlocked jury had been discharged. The Court noted that the constitutional principle underlying the Double Jeopardy Clause was the prohibition against multiple trials and said that "the most fundamental rule in the history of double jeopardy law has been that a verdict of acquittal . . . could not be reviewed." *Id.* at 571. quoting *United States v. Ball*, 163 U.S. 662, 671 (1896). The Court also discussed the importance of the role of a judgment of acquittal in protecting defendants against a deficient prosecution. The Court explained that a second trial caused by the state's appeal of a judgment of acquittal following a hung jury differed from a retrial of a defendant following a hung jury because in the former situation, the defendant had been "acquitted." The Court declared that a retrial may be permissible following a mistrial without a verdict, whereas a retrial is not permitted once the verdict has been rendered. *Id.* at 575-576. The Court

concluded that the trial court's ruling was an acquittal "in substance as well as form", thus, an appeal by the prosecution was prohibited under the *United States v. Fong Foo,* 369 U.S. 141 (1962) decision. *Id.* at 571-572.

In 1986, this Court decided *Smalis v. Pennsylvania*, 476 U.S. 140 (1986) and unanimously held that a trial court's granting a demurrer based on insufficiency of the evidence in a bench trial constitutes a non-appealable acquittal for double jeopardy purposes. The decision prohibited an appeal by the state since further trial proceedings would have been required. On completion of the state's case in a non-jury trial, the trial judge sustained the defendant's demurrer challenging the sufficiency of the prosecution's evidence. The Superior Court of Pennsylvania found the decision unreviewable. The Pennsylvania Supreme Court reversed, holding that the appellate courts could review the case because the granting of a demurrer is not the functional equivalent of an acquittal, and because it was the defendant's choice to request a dismissal on those grounds. In a unanimous opinion, this Court disagreed and concluded that the Double Jeopardy Clause precluded the prosecution's appeal. This Court said that a demurrer constituted an acquittal because the trial judge ruled as a matter of law that the prosecution lacked evidence to establish factual guilt. It was thus held that "the trial judge's granting of petitioner's demurrer was an acquittal under the Double Jeopardy Clause, and [therefore] the Commonwealth's appeal was barred because reversal would have led to further trial proceedings." *Id.* at 146.

Federal habeas review

Under habeas review, the state court's ruling was not contrary to, or an unreasonable application of, the foregoing Supreme Court precedent. The United States District Court and the Sixth Circuit in this case were without legal authority to grant Respondent Vincent's petition with respect to any matter that the Michigan Supreme Court adjudicated on the merits unless the state court's determinations were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). With respect to the law governing § 2254(d)(1), "contrary to" established Supreme Court precedent means "substantially different from the relevant precedent." "A state-court decision is 'contrary to' our clearly established precedents, if it 'applies a rule that contradicts the governing law set forth in our cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.'" *Early v. Packer*, ___ U.S. ___, 123 S. Ct. 362, 365, 154 L.Ed.2d 263, 271 (2002).

The only definitive source of clearly established federal law under AEDPA is the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision. *Williams v. Taylor,* 529 U.S. 362, 412 (2000). This Court has stated that § 2254(d)(1) imposes a "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy,* 521 U.S. 320, 333 n. 7 (1997), and "demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. ___, 123 S. Ct. 357, 360, 154 L.Ed.2d 279 (2002).

This Court explained in *Williams*, that the "contrary to" and "unreasonable application" clauses have independent meaning. A state court decision will be "contrary to" this Court's clearly established precedent if the state court either applies a rule that contradicts the governing law set forth in the court's cases, or confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from the Court's precedent. *Id.* at 405-406. Respondent claims that the state court's decision in this case is contrary to *Smalis* because further trial proceedings in this case were conducted following the grant of an order which acquitted the defendants. But the argument fails to address the threshold question of acquittal. Assuming the motion was granted, did it acquit the defendant then and there? Or would an acquittal occur only when the order was executed by an instruction or some notification given to the jury regarding first-degree murder? *Smalis* did not address that question.

This case and *Smalis* clearly cannot rationally be termed "materially indistinguishable." *Smalis* involved the question whether a certain kind of order by the trial court was an acquittal. The present case involves the question whether a directed verdict is an acquittal as soon as an order is granted, or not until a written order is entered or until the jury is instructed in accordance with its terms. *Smalis* involved a bench trial and a prosecutor's attempt to appeal, while the present case involves a jury trial and reconsideration of his own order by a trial judge prior to any further proceedings. In *Smalis,* trial proceedings would have been re-initiated years later if the prosecutor's appeal was successful. In the present case, the trial was

not interrupted. Clearly the cases are materially distinguishable, and the state court's decision was not "contrary to" *Smalis*.

This leaves open the question, therefore, whether the trial judge unreasonably applied this Court's established double jeopardy rules when he concluded that his oral grant of the defendant's motion did not terminate jeopardy because it had not been communicated to the jury. If a decision is not contrary to United States Supreme Court law, the court must consider it under the unreasonable application clause. *Early,* 123 S. Ct. at 366.

In a jury trial, jeopardy attaches when the jury is sworn. *United States v. Serfass*, 420 U.S. 377, 388 (1975). Jeopardy terminates when the jury is discharged. *Green v. United States*, 355 U.S. 184, 191 (1957). There are at least three conceivable points at which jeopardy could be held to terminate by acquittal in a jury trial. The first is upon the utterance of words by a trial judge granting a motion for an order of acquittal. The second is upon the court's instruction to the jury that it is not to consider the charge in question. The third is upon the jury's discharge.

Respondent argues for the first point – the moment an order is granted, but can cite to no case decided by this Court that so holds, or that even comes close enough to be applied to the question. If this Court had granted *certiorari* to Vincent on direct appeal, it might have rendered a decision more clearly defining the point at which a criminal defendant is acquitted by a directed verdict in a jury trial. On habeas review the question is whether the state courts unreasonably applied this Court's precedents. *Penry v. Johnson*, 532 U.S. 782, 794-795 (2001). The standard is highly deferential and demands that the state be given the

benefit of the doubt. *Woodford v. Visciotti*, ___ U.S. ___, 123 S. Ct. 357, 360, 154 L.Ed.2d 279 (2002).

Citing *Smalis*, the Sixth Circuit held that the determination whether the trial court's statement was an acquittal was a federal question and not a factual question as Petitioner had argued. But the conclusion that the Michigan Supreme Court decided a federal question does not support the Sixth Circuit's abandonment of the standard of review mandated by the AEDPA. The federal court's habeas jurisdiction *requires* a petitioner to raise a federal question. 28 U.S.C. § 2254(a). The Court of Appeals' declaration, "We are not bound by the holding of the Michigan Supreme Court," and subsequent *de novo* review, was fundamentally erroneous.

Because no case from this Court has considered the issue here – whether a directed verdict becomes an acquittal terminating jeopardy when a motion is granted or not until the jury is so directed – the Michigan court's decision did not unreasonably apply any Supreme Court case.

The Michigan Supreme Court in this case [*People v. Vincent*, 355 Mich. at p. 118, fn. 4; Pet. App. p. 33a] was fully cognizant of the fact that there is no clearly established United States Supreme Court decision holding that a grant of a directed verdict of acquittal, which is reconsidered by the trial court and reversed prior to commencement of further trial proceedings, and never communicated to the jury, violates the Fifth Amendment prohibition against double jeopardy. The Michigan Supreme Court expressly acknowledged the principles articulated in *Martin Linen*, and *Smalis*. *Vincent,* 456 Mich. at 121 [Pet. App. p. 36a]

Cases from various jurisdictions on facts similar to the facts in this case demonstrate that if a rule has been clearly established by this Court, it is not apparent to many of the country's appellate courts.

The recent case of *People v. Williams*, 188 Ill. 2d 293, 721 N.E.2d 524 (1999) is substantially similar to the case at bar. The defendant challenged his armed robbery conviction in the Illinois state court following a bench trial. He had been charged with murder and armed robbery. At the conclusion of the state's case, defense counsel moved for a finding of not guilty on both charges. The judge granted the motion as to the murder charge. After indicating that she was going to grant the motion as to the robbery charge as well, the court reconsidered, asked for legal authority, and ultimately denied the motion. Neither the state nor defendant presented further evidence, and Williams was convicted of armed robbery. Williams argued that the judge's initial pronouncement constituted an acquittal, and her reconsideration violated the Double Jeopardy Clause of the Fifth Amendment.

Williams' double jeopardy claim was raised on direct appeal and rejected by the Illinois Supreme Court with two Justices dissenting. The Illinois Supreme Court accepted that, under Illinois precedent, an unequivocal oral pronouncement could not be reconsidered, but found the judge did not make such a pronouncement. The court concluded that the trial court did not grant the defendant's motion for a directed finding of not guilty as to the armed robbery charged and held that his conviction did not place him in double jeopardy.

Other courts have held that even where there has been an order directing a verdict of acquittal, the order

may be set aside where the jury has not been discharged. *Campbell v. Schroering*, 763 S.W. 2d 145 (Ky. App. 1988). In *State v. Iovino*, 524 A.2d 556 (R.I. 1987) the court, citing *Martin Linen Supply Co.* held that double jeopardy did not preclude a judge from reconsidering the motion. "[T]he distinction . . . lies in the fact that the reconsideration in this case had no effect on the continuance of the trial in which it was made, the jury remained impaneled to adjudicate lesser included charges, and that defendant was not faced with any threat of reprosecution beyond the jury already assembled to hear his case." *Id.* at 559. *See also State v. Sperry*, 149 Ore. App. 690, 699, 945 P.2d 546 (1997) (trial court's oral judgment of acquittal later reversed outside presence of jury held not to violate Fifth Amendment Double Jeopardy Clause); *People v. Jackson*, 647 N.Y.S.2d 764 (1996), *lv. den.*, 654 N.Y.S.2d 726 (1996).

No violation of double jeopardy principles was found in several cases in which the trial judge expressed a willingness to reconsider the motion in the same colloquy in which it was granted, as the Michigan Court did in this case. *United States v. Byrne*, 203 F.3d 671 (9th Cir. 2000), *cert. den.*, 531 U.S. 1114 (2001); *State v. Newfield*, 161 Ariz. 470, 778 P.2d 1336 (1989); *State v. Collins*, 112 Wash. 2d 303, 771 P.2d 350 (1989); *United States v. Baggett*, 251 F.3d 1087 (6th Cir. 2001), *cert. den.*, 534 U.S. 1167 (2002). Other cases have found no violation where the jury was not informed of the grant of a directed verdict. *United States v. Washington*, 48 F.3d 73 (2d Cir. 1995), *cert. den.*, 515 U.S. 1151 (1995) (no violation where jury not informed); *United States v. Lo Russo*, 695 F.2d 45 (2d Cir. 1982), *cert. den.*, 460 U.S. 1070 (1983) (same); *United States v. Rahman*, 189 F.3d 88, 98-102 (2nd Cir. 1999), *cert. den. sub nom Nosair v. United States*, 528 U.S. 982

(1999) (same); *but see United States v. Blount*, 34 F.3d 865 (9th Cir. 1994) (announcement of directed verdict to jury terminated jeopardy, preventing later reinstatement of charges); *Lowe v. State*, 242 Kan. 64, 744 P.2d 856 (1987) (grant of directed verdict may not be withdrawn even where the jury was not informed). Still others have based their conclusions on whether or not the defendant had put on his defense between the grant and its withdrawal. *State v. Blacknall*, 288 N.J. Super. 466, 672 A.2d 1170 (1995) (where defendant had taken the stand in his own defense after grant of motion to dismiss kidnapping charge, court could not reinstate). Not only do these cases support the reasonableness of the Michigan Supreme Court decision, they also demonstrate that this Court has not decided the issue.

B. Respondent was not placed twice in jeopardy by the trial court's actions in this case.

The lower court decisions cited above illustrate the unworkability of a rule that an acquittal occurs the moment words escape a trial judge's mouth reflecting the grant of a directed verdict. Because the erroneousness of an acquittal is immaterial to the double jeopardy question pursuant to *Fong Foo*, even a simple misstatement by a judge could terminate jeopardy under such a rule. By way of example, the appellate courts of Illinois have, in a number of decisions, appeared to adopt the rule the respondent seeks. *People v. Hutchinson*, 26 Ill. App. 3d 368, 325 N.E.2d 115 (1975); *People v. Strong*, 129 Ill. App. 3d 427, 472 N.E.2d 1152 (1984); *People v. Stout*, 108 Ill. App. 3d 96, 438 N.E.2d 952 (1982); *People v. Brown*, 227 Ill. App. 3d 795, 592 N.E.2d 342 (1992).

In *People v. Vilt*, 119 Ill. App. 3d 832, 75 Ill. Dec. 346, 457 N.E.2d 136 (1983), *appeal after remand,* 139 Ill. App. 3d 868, 488 N.E.2d 580 (1985), *cert. den.*, 479 U.S. 864 (1986), the court faced a double jeopardy challenge based on the following dialogue in response to a defendant's motion for directed verdict:

> THE COURT: *That motion will be allowed.*
>
> MR. GERTS (The assistant State's Attorney): May I ask why?
>
> THE COURT: Wasn't any evidence of anal sodomy.
>
> MR. GERTS: I think she testified that – Theresa testified of the contact.
>
> THE COURT: Or am I thinking, am I thinking of the other girl?
>
> MR. GERTS: Tami George there was no anal act with.
>
> THE COURT: I am sorry, I am sorry, I am talking, I am thinking of Tami George, that is right.
>
> MR. GERTS: Tami was in the dress.
>
> THE COURT: *That motion will be denied.*
>
> MR. KIELIAN [defense counsel]: Could I be –
>
> THE COURT: Yes you may be heard on it but I am sorry, I had the wrong, the wrong cases. [*Vilt*, 119 Ill. App. 3d at 833-34 (emphasis added)]

The Appeals Court rejected defendant's double jeopardy claim, distinguishing the preceding cases by stating that the judge in *Vilt* reversed himself "practically in the same breath."

Clearly, a rule that a defendant is acquitted as soon as granting words are spoken is both unjust and unworkable. Further, the rule would be unnecessary to protect the interest that the Double Jeopardy Clause was designed to protect. The underlying purpose of the Double Jeopardy Clause is to protect a defendant from being tried or punished twice for the same offense. *United States v. Wilson*, 420 U.S. 322, 339 (1975). The clause is a "bar against repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent." *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980). But see, *Sattazahn v. Pennsylvania*, ___ U.S. ___, 154 L.Ed.2d 588 (2003), where this Court said " . . . we have not found this concern determinative of double jeopardy in all circumstances."

As stated in Justice Brennan's concurring opinion in *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 320 (1984):

> The question of whether jeopardy has objectively "terminated" should be analyzed in terms of the policies underlying the Double Jeopardy Clause, namely, its concern that repeated trials may subject a defendant "to embarrassment, expense and ordeal and [compel] him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-188 (1957). Jeopardy may be said to have terminated only when the posture of a trial in some objective sense leaves the defendant in such a position that resumption of proceedings would implicate those policies.

Because the rule sought by Respondent Vincent is unwise for reasons of public policy, and unnecessary to protect a defendant's double jeopardy rights, and would lead to unjust results, Petitioner urges this Court to hold that Respondent's double jeopardy rights were not violated.

CONCLUSION

In this case, the Sixth Circuit Court of Appeals was called upon to review, on habeas corpus, the decision of a state court which made a careful, reasoned attempt to apply this Court's precedents regarding double jeopardy to the facts of the case before it. Although this Court, in *Williams v. Taylor*, provided guidelines for the application of the deferential review mandated by the Antiterrorism and Effective Death Penalty Act of 1996 in just such circumstances, the Court of Appeals failed. It offered no deference to the Michigan Supreme Court's factual finding, and applied a rule to the case that this Court has never announced or applied.

Duyonn Vincent was in jeopardy only once. His guilt was determined in a single trial before a single finder of fact. "A defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact." *United States v. Wilson*, 420 U.S. ___, 345 (footnote omitted). There is no rationale for the result reached by the Court of Appeals that is rooted in the core purpose of the Double Jeopardy Clause of the Fifth Amendment. The Michigan state court's rejection of Vincent's double jeopardy claim was neither contrary to, nor an unreasonable

application of, United States Supreme Court law. The decision of the Sixth Circuit Court of Appeals must be reversed.

Respectfully submitted,

MICHAEL A. COX
Attorney General

THOMAS L. CASEY
Solicitor General

JANET A. VAN CLEVE
Assistant Attorney General

ARTHUR A. BUSCH
Genesee County
Prosecuting Attorney
DONALD A. KUEBLER
Chief, Research, Training
& Appeals

JOHN C. SCHLINKER
Deputy Chief Assistant
Prosecutor

Special Assistants
Attorney General

DALE A. DEGARMO
Assistant Prosecuting
Attorney

MICHAEL A. TESNER
Assistant Prosecuting
Attorney